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Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, Dc 20554

Re: Application by SWBT for Authorization for Authorization To Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4

Dear Ms. Salas:

This letter is submitted on behalf of AT&T to respond to legal and factual assertions about pricing of unbundled network elements made for the first time by SBC Communications, Inc. ("SBC") in its reply brief in support of the above-referenced application. Although the Commission's existing rules and procedures plainly forbid acceptance or consideration of SBC's new assertions, if those assertions are nonetheless included in the record, the Commission should consider this response as well.

In its Comments and Reply Comments, AT&T demonstrated that SBC had not met its burden of proving that certain of its nonrecurring charges applicable to the UNE-platform comply with the Commission's pricing rules. AT&T further demonstrated that these charges are not cost-based, but are "phantom glue charges" that were approved by the TPUC in response to the 8th Circuit's since-vacated ruling permitting incumbent LECs to separate pre-existing combinations of unbundled network elements. Thus, as the TPUC has stated, it "did not permit AT&T or MCI to acquire elements in combined form at cost-based rates." Rather, CLECs are also required to pay a "combination fee . . . [o]n top of the TELRIC cost."[1]

SBC's "Accessible Letter"

Having conspicuously omitted any reference to these charges from its opening brief, and devoting all of a single paragraph to them in its accompanying affidavits, SBC now claims (Reply Br. at 58) that it has through an accessible letter "[e]liminat[ed]" the glue charges "pending completion of an ongoing TPUC proceeding," and that this "necessarily addresses any complaints the CLECs could have on this issue." As the CLEC most immediately and extensively affected by these charges, AT&T vigorously disputes both SBC's characterization of its recent action, and the impact of that action -- even as erroneously characterized by SBC -- on the Commission's responsibility to

[1] Transcript of Oral Argument, SWBT v. AT&T, Civ. Action No. A-98-CA-197, 10/09/98, at 44 (Attachment 7 to Rhinehart Declaration submitted with AT&T's January 31, 2000 Comments in this proceeding).

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determine the lawfulness of the charges. In fact, SBC's purported "elimination" of the glue charges does not address AT&T's concern, but is designed to evade the review process prescribed by Congress for Section 271 applications: an independent determination by the Commission followed by review in the DC Circuit.

As a preliminary matter, SBC's accessible letter makes clear that SBC has not, as claimed in its reply brief, "eliminated" the glue charges, but merely "offer[ed]" (SWBT Accessible Letter No. CLECTA00-017) to refrain from collecting them "subject to true up" based on further proceedings before the TPUC. By requiring CLECs to provide notice of acceptance, SBC's letter appears improperly to be conditioning the offer on extracting an agreement by CLECs to pay the charges retroactively when and if the TPUC issues its ruling.

In all events, an analysis of the accessible letter under the Commission's BANY 271 Order makes clear that it provides no support for a finding that SBC has satisfied the pricing requirements of the competitive checklist.[2] In substance, the accessible letter converts the $20.47 in permanent nonrecurring charges that AT&T has challenged to an interim charge of "0." In its BANY 271 Order (para. 260), however, the Commission stated that although it is "clearly preferable" to base a 271 application on permanent rates, it would be "willing at [that] time" to grant a Section 271 application with a "limited number" of interim rates where certain "confidence-building factors" are present. The Commission made clear (para. 259) that it would not approve an application containing interim rates if "any" of the factors it had identified were absent. Here, all of those factors are absent.

Specifically, in stark contrast to the interim charges at issue in the BANY 271 Order, the charges here are not limited to a "few isolated ancillary items" (para. 258). Rather, SBC's glue charges apply to each and every order for the UNE-platform, which remains the principal means by which CLECs are seeking to enter the residential local market in Texas. Again in contrast to Bell Atlantic's interim charges, SBC's interim charges are not for a "new service" (BANY 271 Order, para. 259), but for an arrangement that CLECs have been seeking in Texas and elsewhere for four years. Further, it has now been more than a year since the Supreme Court eliminated the sole reason the charges were imposed: to compensate SBC for relinquishing the "right" erroneously granted to it by the 8th Circuit to disassemble existing combinations of network elements.

Neither of the other "confidence building factors" identified by the Commission in the BANY 271 Order is present here. First, far from eliminating or even minimizing uncertainty in Texas, the "true-up" is the very source of that uncertainty. In contrast to the true-up in New York, which the Commission specifically described (para. 261) as a "refund mechanism," the nonrecurring charges that SWBT claims to be reducing to 0 can

[2] Application of BANY for Authorization Under Section 271 of the Communications Act to Provide In-Region, interLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, released Dec. 22, 1999.

only go up, and thus operate retroactively to "penalize" (and thus deter) the very local entry it is the Commission's policy – and statutory duty – to promote.

Second, the TPUC's "track record" (paras. 259, 261) has been one of continued support for the glue charges even after the Supreme Court eviscerated the basis upon which they were approved.[3] The TPUC has offered no evidence in this proceeding or elsewhere that its position has changed. If the Commission were to rely upon SBC's accessible letter, the only consequence of that letter will be avoidance of Commission scrutiny of SBC's charges, at least prior to SBC gaining authorization to provide long distance services.

And that, of course, is the entire purpose of SBC's accessible letter. From the beginning, SBC has gone through extraordinary contortions to evade meaningful review of its charges in the Section 271 process. Since January 25, 1999, when the Supreme Court issued its decision, SBC has known that the lawfulness of its glue charges would be vigorously contested by AT&T and other CLECs in a Section 271 application for Texas. Yet SBC made no attempt following the Supreme Court's decision to establish a record in Texas that would support its charges. When it filed its application with the Commission, SBC submitted only a conclusory explanation of, and no support for, its charges. It chose to do so notwithstanding the Commission's holding in the Ameritech Michigan 271 Order that Section 271 applicants should submit in their applications "detailed information" regarding development of prices, and notwithstanding the Commission's statement in its BANY 271 Order that it was "skeptical of glue charges" (para. 262).

There is little doubt that the D.C. Circuit will clearly recognize that SBC's accessible letter as merely the next round in "an administrative law shell game" designed to evade the stringent process mandated by Congress for Section 271 applications, including review by that Court.[4] The Commission should decline SBC's invitation to be a party to this scheme.

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[3] As described in AT&T's comments and reply comments in this proceeding, and its accompanying affidavits addressed to the glue charges, the TPUC found in its original proceeding, and represented to a federal district court, that the charges reflect the costs that SBC incurs to recombine network elements that are first separated by SBC, and were authorized by the 8th Circuit's now-vacated decision to invalidate FCC Rule 315(b). Following private negotiations between SBC and the TPUC to settle outstanding disagreements between SBC and CLECs, however, the TPUC announced a "Memorandum of Understanding" that authorized SBC to continue to collect the full amount of the charges now challenged by AT&T, notwithstanding the Supreme Court's decision reinstating Rule 315(b). This provision of the MOU is now contained in the T2A agreement upon which SBC's application relies. In its comments to the Commission, without conducting further proceedings or even acknowledging or explaining its prior findings or rationale, the TPUC has now stated that it believes, contrary to what it told the court, that the charges are in fact cost-based.

[4] AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir.1992).

SBC's New Evidence

In its Reply, SBC offers a number of new facts and contentions in defense of its glue charges -- including (for the first time, at least in this proceeding) a detailed list of the tasks which it now claims are covered by the charges. Once again, the Commission's rules and procedures foreclose consideration of these new materials; however, if the Commission intends to consider them, it should consider this response as well. [5]

First, SBC states: "[c]ontrary to AT&T's and MCI's assertions, the UNE prices for these three elements [i.e., (1) the 8db 2 wire loop, (2) the analog loop to switch port cross connect, and (3) the analog line port] do not reflect the blending or averaging of the costs Southwestern Bell would incur to combine UNEs". (Smith Reply Aff. ¶ 3.) While MCI can speak for itself, AT&T has never contended that SWBT's glue charges reflect any such averaging of costs, and we agree that they do not. In fact, AT&T has always maintained that they reflect no costs at all. SBC appears to have AT&T confused with the TPUC, which does argue, contrary to its prior findings and representations to the court, that SBC's charges reflect some sort of averaging of the "cost of all combinations, both pre-existing and new" (TPUC Comments at 26) -- a contention that AT&T denies and has responded to at length in its Reply Comments (pp. 27-32).

Second, SBC claims – notwithstanding the TPUC's repeated prior statements to the contrary -- that the charges do not reflect "combining" costs (Smith Reply Aff. ¶ 8).[6] Instead, SBC contends that the charges apply to activities that (depending on which paragraph of Ms. Smith's Reply Affidavit one chooses to read) either "involve the installation of the element" (id. ¶ 8) or "take place after the physical construction and installation of the element occurs and the element must then be made ready for service" (id. ¶ 5). In fact, as AT&T (and the TPUC) have repeatedly stated, the charges reflect the cost of combining UNEs; however, in the case of pre-existing combinations of UNEs, that work is not performed, rendering SBC's NRCs "phantom" glue charges.

Third, SBC asserts that the activities covered by the charges are reflected in "Attachment A" to the Smith Reply Affidavit, which SBC explicitly describes as

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[5] The information in Attachment A is conspicuously absent from the cost studies provided by SBC to the TPUC, and to the Commission with its application. Compare SWBT Proprietary Materials, Vol. 1, Tab 2; Id., Vol. 5, Tab 29; Id., Vol. 6, Tab 42. SBC's attempt to supplement the record with material that it could and should have included in its opening comments violates the Commission's procedural rules, and confirms that the cost studies it submitted with its application, do not, in fact, support the charges. In all events, the information set forth in Attachment A also does not support the charges, for the reasons stated in the text.

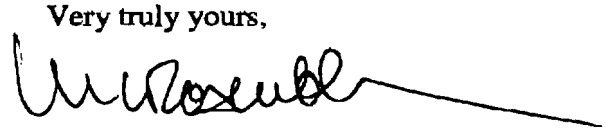
[6] Compare, Rhinehart Decl. Att. 3: Transcript of 12/1/97 Open Meeting (TPUC: "[T]he individual nonrecurring charges for each of the unbundled parts does reflect the labor that Bell takes to either actually or hypothetically combine the elements to deliver a packaged service."); Transcript of Oral Argument, 10/09/98, at Tr. 44 ("It's the combination fee ... [o]n top of the TELRIC cost.") (Emphasis added.)

reflecting the "nonrecurring work activities and charges for new combinations". (Id. ¶ 4 (emphasis added). See also id. ¶ 8.) This statement, if true,[7] confirms AT&T's position that the charges cover activities which are undertaken in connection with "new combinations", but are not undertaken when a CLEC converts a former SBC customer to CLEC service using the same, pre-existing combination of UNEs that SBC previously used to serve the same customer. AT&T has never objected to paying the charges in connection with "new combinations", because when SBC provides new UNE combinations, it may actually do some or all of the work that the charges supposedly cover. (See AT&T Reply Comments at 30, n.46.) That is not the case with pre-existing combinations.[8]

SBC also implies (without stating) that the fact that Attachment A identifies and allows for the "probabilities of occurrence" for each task listed therein somehow legitimizes SBC's claim that the charges may be properly applied, e.g., to UNE-P conversions (Smith Reply Aff. ¶¶ 7-8); however, that is clearly not the case. Rather, the "probabilities" set forth in Attachment A (like everything else in Attachment A) apply to "new combinations". (Id. ¶ 4.) They do not reflect the "probabilities" of such activities occurring in connection with pre-existing combinations.[9]

In sum, SBC's glue charges, whether deemed interim or otherwise, are unlawful, and preclude a finding that SBC has satisfied the pricing requirements of the competitive checklist.

Very truly yours,



[7] Attachment A appears to have been created for this Application. It provides no citations to the record. We assume, solely for purposes of argument, that it is what SBC represents it to be.

[8] Rhinehart Decl., paras. 36-42.

[9] This is demonstrated (among other things) by the fact that, for the cross-connect NRC, Attachment A assumes that Mechanized Line Testing will occur 100% of the time (Smith Reply Aff., Att. A at 3). It is true that such testing is done for new UNE combinations. But it is not required or performed for pre-existing combinations. If UNE-Platform orders had been factored into the cross-connect NRC, the probability of occurrence would have been well below 100%.